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No. 274

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

PHILLIPS PETROLEUM COMPANY,
a corporation,
Petitioner,

VERSUS

CABOT CARBON COMPANY,
a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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September, 1954.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8750

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PHILLIPS PETROLEUM COMPANY,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

For convenience the respondent, Cabot Carbon Company, will be referred to herein as "Cabot"; the petitioner, Phillips Petroleum Company, will be often referred to as "Phillips" and the Corporation Commission of Oklahoma will be referred to as "Commission."

STATEMENT OF THE CASE

Petitioner's statement of the case is erroneous and misleading in several respects and for this reason we make a short statement of the material facts.

On March 10, 1944, Cabot and Phillips entered into a contract (R. 31) whereby Cabot agreed to assign certain designated oil and gas leases then owned by it to Phillips and to execute to Phillips leases on certain other lands in which Cabot owned all or part of the minerals.

In Paragraph 4 of the contract (R. 32) it was agreed that Cabot would reserve an undivided one-fourth of seven-eighths interest in the natural gas underlying said lands or in any natural gas which should be produced therefrom and that Phillips would purchase Cabot's share of the gas, when produced, at a price of 4¢ per thousand cubic feet.

The exact wording of Paragraph 4 of the contract which Phillips has failed to quote in its petition and has consistently erroneously alluded to indirectly, is as follows:

> "4. From the leasehold estates assigned and granted to Phillips, or any renewals thereof Cabot shall (in addition to the one-eighth royalty provided in the leases granted to Phillips on Oklahoma Producers Form 88) *reserve an undivided interest in the natural gas underlying said lands or in any natural gas which may be produced therefrom* which shall be free of development and operating costs and equal to one-fourth of seven-eights of all the gas produced. Phillips shall become the owner of the gas when produced and will account to Cabot for said one-fourth of seven-eighths of the gas produced at a value of four cents (4¢) per MCF. The volume of gas produced shall be determined on the basis of an assumed temperature of sixty degrees Fahrenheit and an absolute pressure of 16.4 pounds per square inch" (R. 32).[1]

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[1] Unless otherwise stated, emphasis in quoted material is ours.

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Neither the contract nor any lease or assignment thereunder labels this interest "overriding royalty."

As specifically pointed out in the opinions of the Court of Appeals and the District Court, such reservations were incorporated in all of the assignments, leases and other instruments executed by the parties.

On December 9, 1946, the Commission entered its 7¢ price fixing order No. 19514 (R. 60), effective as of January 1, 1947, which, in addition to comprehensive and elaborate findings, provided:

> "That no natural gas *shall be taken out* of the producing structures or formations in the Guymon-Hugoton field in Texas County, Oklahoma, at a price, at the wellhead, of less than 7¢ per thousand cubic feet of natural gas * * *" (R. 67).

At the same time the Commission entered Order No. 19515 (R. 68), which is largely a repetition of Order No. 19514 with the addition that it directs Cities Service Gas Company to take gas ratably from Peerless Oil & Gas Company.

On January 17, 1947, Phillips filed an application (R. 78) with the Commission to vacate Order No. 19514 and so much of Order No. 19515 as applied to Phillips. The Commission by Order No. 19702 of February 4, 1947, denied the application (R. 84, 87).

Cities Service Gas Company appealed to the Oklahoma Supreme Court from Orders Nos. 19514 and 19515. Phillips also appealed from these orders and from Order No. 19702 denying its application to vacate (R. 94). The cases were

consolidated in the Supreme Court of Oklahoma which affirmed the orders of the Commission and held that the Commission under its broad regulatory powers had authority to fix the minimum price of gas and that the orders did not violate either the Due Process and Equal Protection Clauses of the Federal and State Constitutions or the Commerce Clause of the Federal Constitution. *Cities Service Gas Company* v. *Peerless Oil and Gas Company*, 203 Okla. 35, 220 P.2d 279.

Phillips and Cities Service Gas Company appealed to this Court which, in *Cities Service Gas Company* v. *Peerless Oil and Gas Company*, 340 U.S. 179, and *Phillips Petroleum Company* v. *Oklahoma, et al.*, 340 U.S. 190, on December 11, 1950, affirmed the judgments of the Oklahoma Supreme Court.

On May 17, 1951, the Commission, upon the application of Panoma Corporation, entered Order No. 24745 (R. 91, 94, 95) wherein the Commission stated that it deemed it appropriate to find that when it entered its Order No. 19514

> "that it applied to all producers, purchasers and takers of gas from said field, *and that no sales or purchases of natural gas* would be thereafter permitted in the Guymon-Hugoton field at a price of less than 7¢ per thousand cubic feet, * * * so that *the owners of the gas within said reservoir, being the lessees and lessors, and other persons owning an interest in the gas in place,* should at all times from and after the issuance of said order, receive from the delivery of their gas, as owners and producers thereof, not less than the minimum price fixed by the Commission" (R. 91-95).

Natural Gas Pipe Line Company of America appealed to the Supreme Court of Oklahoma from Order No. 24745, which Court affirmed the order on September 15, 1953. *Natural Gas Pipe Line Company of America* v. *Panoma Corporation, et al.*, 271 P.2d 354 (not officially reported).

On July 29, 1952, the Commission, pursuant to the application of certain mineral owners in Texas County, Oklahoma, entered Order No. 26096 (R. 96) increasing the price of gas in the Guymon-Hugoton field from 7¢ to 9.8262¢ per thousand cubic feet (R. 100).

From this last order appeals were taken to the Supreme Court of Oklahoma which affirmed the order on April 27, 1954. *Natural Gas Pipe Line Company of America* v. *Corporation Commission of Oklahoma*, 272 P.2d 425 (not officially reported).

On November 28, 1952, Cabot instituted this action against Phillips in the United States District Court for the Western District of Oklahoma to recover a money judgment for the difference between the minimum prices fixed by the Commission for gas sold by Cabot to Phillips and the 4¢ price specified in the contract.

At the trial of this action Phillips stipulated that it made no contention herein that Order No. 26096 was invalid, but called attention to the fact that appeals to the Supreme Court of Oklahoma were pending by others than the parties to this suit. The parties referred to were Natural Gas Pipe Line Company of America, Michigan-Wisconsin Pipe Line Company and Panhandle Eastern Pipe Line Company. The three appeals were consolidated in

the Supreme Court. Phillips, a defendant in error in each case, defended and urged the affirmance of the order. *Natural Gas Pipe Line Company of America, et al.* v. *Corporation Commission, et al., supra.* The District Court rendered judgment on June 30, 1953 (R. 13-17) in favor of Cabot for the full amount of its claim and made findings of fact and conclusions of law (R. 14-17) and filed a written opinion (R. 12), 114 F. Supp. 953, 956. With reference to the contract involved herein the Court said:

> "It is apparent from the wording of the original contract and the leases and assignments executed in pursuance thereof that the parties intended that Cabot would retain title to its reserved undivided interest in the gas until it had been produced, and that Phillips was to acquire title and ownership only after production, when the gas could be measured and Cabot paid therefor. Cabot and Phillips were joint owners of the leasehold estate. Phillips contracted to produce the gas for both and when produced to purchase Cabot's share of the gas. It follows that Cabot was a joint producer and seller, and Phillips, the operator, was a joint producer and purchaser at the wellhead. The contract price is, therefore, superseded by the price fixing orders of the Corporation Commission."

On appeal the Court of Appeals affirmed the judgment of the District Court and in its opinion with reference to the contract (210 F.2d 841, 843) stated:

> "The contract between Phillips and Cabot recognizes a right in Cabot to an interest in the gas in place. In the contracts and leases the parties treated Cabot as the owner of the gas. The contract provided that Cabot would reserve an undivided interest in the natural gas underlying the lands or any natural gas which would

be produced therefrom. In the assignment of the leases which Cabot held it reserved ' "unto itself and its successors and assigns an undivided interest in the natural gas underlying the lands covered by this assignment and *produced therefrom* equal to one-fourth (1/4) of seven eighths (7/8) of all gas *produced from said lands* * * *." ' All the conveyances between the parties recognized such interest in the gas in place and in the production thereof. Such provisions are wholly inconsistent with the premise that Phillips became the owner of all the gas at the instance of production and that Cabot had no interest therein. The provision that ' "Phillips shall become the owner of the gas when produced" ' must be considered in context with all the rest of the provisions of the contract and the various assignments between the parties. It was no doubt inserted to make sure that Phillips should have the right to all the production from these leases including its interest therein, as well as the interest of Cabot, upon payment therefor. When so considered, the practical effect thereof was to give Phillips the right to receive Cabot's interest in the production by paying therefor the contract price of 4¢."[2]

THE PETITION FAILS TO STATE ANY GROUND FOR CERTIORARI

The petition for certiorari does not set forth any of the grounds in Rule 19 of Part V of the Revised Rules of this Court effective July 1, 1954, in that

(a) The decision of the Court of Appeals is not in conflict with the decision of any other court of appeals on the same matter;

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[2] Emphasis supplied by Court of Appeals.

The Court of Appeals did not decide:

(b) An important state question in a way in conflict with applicable state law;

(c) An important question of federal law which has not been settled by this Court;

(d) A federal question in conflict with applicable decisions of this Court;

(e) The Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings or sanctioned such departure by a lower court as to call for an exercise of this Court's power of supervision.

ANSWER TO PETITIONER'S ALLEGED REASONS FOR GRANTING THE WRIT

I.

The first reason alleged by petitioner for granting the writ is that the Court of Appeals' decision is opposed to Order No. 28884 of the Commission made July 16, 1954, and that said order is conclusive upon the federal courts as to the meaning and application of the price fixing orders.

The application of Phillips and the order of the Commission referred to appear only in the appendix to Phillips' petition for the writ and are no part of the record in this case. We are aware of no decision which justifies their consideration. Should we be mistaken, however, and if it is proper for Phillips to bring these extraneous matters to the attention of this Court, we desire to state that the order has been appealed to the State Supreme Court and to

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show that it is invalid and of no force and effect for the following reasons:

(a) On May 24, 1954, after the judgment of the Court of Appeals had become final and after Phillips had obtained an extension of time within which to apply to this Court for a writ of certiorari, Phillips filed with the Corporation Commission an application for an order construing the price fixing orders. This, strangely enough, was more than eight years after the entry on December 6, 1946, of the 7¢ order (No. 19514) which had been superseded by the 9.8262¢ order (No. 26096) effective August 1, 1952.

It is obvious that Phillips sought and the Commission granted a retroactive order under the guise of construing the price fixing orders, but Phillips' real purpose, induced by desperate hope, was that it might by making use of such an order persuade this Court to grant the writ.

The cases cited by Phillips under this heading are inapposite since the meaning of the original price fixing orders had already been established by the Oklahoma Supreme Court and by this Court.

What the Commission seeks to do in its July, 1954, order is to overrule and nullify the constructions made of the original order by the Supreme Court of Oklahoma and by this Court, turn the clock back and make the new order effective as if it had been entered in *December, 1946*. The Commission was wholly without power to enter a new order modifying and changing its earlier orders and give them retroactive effect. *Arizona Grocery Co.* v. *The Atchi-*

son, Topeka and Santa Fe Railway Co. et al., 284 U.S. 370, 389.

The Commission in making the order has actually attempted to adjudicate contract rights between private parties, which it has no jurisdiction, power or authority to do. The Supreme Court of Oklahoma specifically held in *Southwestern Light and Power Co.* v. *Elk City*, 188 Okla. 540, 111 P.2d 820, that the Corporation Commission of Oklahoma is without jurisdiction or power to enter or enforce a judgment or order adjudicating contractual rights of the parties. Other cases to the same effect by the Supreme Court of Oklahoma are:

—*The Atchison, Topeka and Santa Fe Ry. Co.* v. *Corporation Commission*, 68 Okla. 1, 170 Pac. 1156;

Smith v. *Corporation Commission*, 101 Okla. 254, 225 Pac. 708;

Chicago, Rock Island and Pacific Ry. Co. v. *State*, 158 Okla. 57, 12 P.2d 494;

St. Louis-San Francisco Railway Co. v. *State*, 268 P.2d 845 (not officially reported).

Both the District Court and the Court of Appeals in construing the contracts between Phillips and Cabot, held that Cabot owned one-fourth of seven-eighths of the gas in the reservoir, and as produced, and that Phillips purchased the same pursuant to the terms of the contract.

Under the authorities above cited, the Commission did not by Order No. 28884, entered on July 16, 1954, have

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any jurisdiction, power or authority to overrule or change such adjudications.

(b) The application for the order, and the order itself, fail to show any change in conditions from what they were at the time the price fixing orders were made. Therefore, the Commission was without authority to repeal, amend, modify or supplement a previous order issued by it. Title 52, Section 112, O.S. 1951, is so construed by the Supreme Court of Oklahoma in *Carter Oil Company* v. *State et al.*, 205 Okla. 374, 238 P.2d 300, and *Wood Oil Co.* v. *Corporation Commission,* 205 Okla. 534, 239 P.2d 1021. In these opinions the Oklahoma Supreme Court held that the Commission was without authority to review and modify a former order that had become final upon the alleged ground that said order was ill-advised, inequitable or otherwise erroneous. Prior to July 16, 1954, appeals from the price fixing orders had been taken to the Supreme Court of Oklahoma in which the orders were reviewed and construed. *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203 Okla. 35, 220 P.2d 279; *Natural Gas Pipe Line Company of America* v. *Corporation Commission of Oklahoma,* 272 P.2d 425. This Court also construed and applied the 7¢ order in cases heretofore cited.

(c) The Commission's Order No. 28884 of July 16, 1954, is in direct conflict with the above decisions and with its own previous orders. These decisions and orders clearly and unequivocally stated that the price fixing orders applied to all gas in the Guymon-Hugoton pool and to all producers, purchasers and takers of such gas and that the Commission in making the orders and the Supreme Court in

construing and sustaining them was primarily concerned with the conservation of gas, the protection of correlative rights and the interest of royalty owners and every person having an interest in the gas.

In the original price fixing order, No. 19514 (R. 60) the Commission ordered:

> *"that no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton field * * *"*

for less than 7¢ per thousand cubic feet at the wellhead.

In Paragraph 4 of the Findings in Order No. 19702 (R. 84) denying Phillips' application to vacate or modify, the Commission stated that the order applied

> *"to all producers, purchasers and takers of gas in the field, * * *"*

and that Phillips Petroleum Company was a taker of natural gas in the field.

And in Paragraph 6 of said Findings, the Commission stated in substance that there would be discrimination if it did not fix a uniform price for the field and that the state's natural resources would be dissipated and wasted

> "all to the detriment of the producers, royalty owners and School Land Commission of the State of Oklahoma * * *."

In its opinion of January 17, 1950, in the consolidated appeal of Cities Service and Phillips from the 7¢ order heretofore cited, the Oklahoma Supreme Court made

numerous references to the fact that the 7¢ order applied to all gas and that it was intended to and did have for its purpose the protection of royalty and other owners. Pertinent thereto the Court said, at pages 39, 42 and 43:

> "Obviously, the protection of the interest of *all owners of the gas* is the intent of the statute and such is the standard of guidance to the Corporation Commission acting thereunder.
>
> * * * * * * * * *
>
> "Reference to protection of the interest of all those having a right to produce gas from a common source of supply directs attention to the owners of the land overlying the gas and such interests as they have conveyed.
>
> * * * * * * * * *
>
> "Under either of such circumstances prices might be so reduced that *landowners or royalty holders or particular leaseholders* would have their interests in the gas exhausted, dissipated and taken, without having received any reasonable compensation, and each suffer waste of a valuable reversion."

The Commission, in its Order No. 24745 (R. 91), as heretofore stated, specifically found that the order applied to all producers, purchasers and takers of gas from the field and that no sales or purchases of natural gas would thereafter be permitted at a price less than 7¢ per thousand cubic feet, and that the purpose of the order was to insure that owners of the gas in the reservoir, such as lessees, lessors and other persons having an interest in the gas in place would receive such price.

In Order No. 26096 (R. 96-101) fixing the price of gas at 9.8262¢, the Commission reaffirmed the findings and purposes of the 7¢ order.

On appeal in the *Panoma* case, *supra*, the Supreme Court in Paragraph 3 of the syllabus (the syllabus being the law of the case in Oklahoma) said:

> "When the Corporation Commission by valid order fixes the minimum wellhead price which must be paid for natural gas taken from a designated gas field or gas pool, that order supersedes any existing contract by which a purchaser is taking natural gas from such gas field or gas pool at a lesser price; and from and after the effective date of such order *such purchaser owes a legal duty to pay for all gas taken*, as much as the minimum price fixed by such order."

In the opinion the Court stated that:

> "* * * *no one* could legally take natural gas from that field at a price less than 7¢ at the wellhead."

In this opinion the Supreme Court of Oklahoma definitely held that a purchaser of gas violated the price order if it purchased gas at less than 7¢ per thousand cubic feet at the wellhead, even though its contract provided for a lesser price. Likewise, in its recent decision in the case of *Natural Gas Pipe Line Company of America* v. *Corporation Commission et al., supra*, affirming the order of the Corporation Commission, the Supreme Court of Oklahoma reaffirmed its previous decisions in cases involving the 7¢ price fixing order.

In the *Phillips'* case, *supra*, this Court said:

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"Appellant does not argue that the orders violate the Commerce Clause. In other respects, the appeal presents only minor variations of the issues raised by Cities Service. Phillips argues that it is not a purchaser but merely a producer; that unlike the situation in Cities Service, the order as applied to it lacks any connection with correlative rights, the interest of the public, monopolistic practices or discrimination. *The distinction is without a difference; the connection between realized price and conservation applies to all production in the field, whether owners purchase from others or not, and whether they own pipe lines or not. In a field which constitutes a common reservoir of gas, the Commission must be able to regulate the operations of all producers or there is little point in regulating any.*"

Phillips argues, and induced the Commission to hold in its recent order, that in entering the price orders

"the Commission contemplated and intended that the landowners, usual and typical royalty owners, and other persons whose royalty, overriding royalty or other interest in the gas is, by contract, measured by or dependent upon the market value or proceeds of sale thereof by the producer, would under and as a consequence of the terms of their contracts be entitled to payment based upon the minimum price the producer is so required to realize * * *."

The effect of this is that owners of the minerals and royalty owners having such contracts would be affected or benefited by the price orders and a large number of Phillips' lessors would be excluded as Phillips does not have such contracts with them. We must not be misled by Phillips' statement on page 21 of its petition, to-wit:

"It should be borne in mind that most overriding royalties, as well as landowners' royalties, provide for payment on the basis of proceeds of sale by the lessee or the market value of the gas or oil. Such royalties were 'typical' in the Hugoton Field (see Plaintiff's Exhibit 44, R. 113, and Stipulation, R. 26). Such was the type of royalty owners mentioned in the Commission's findings and in the Oklahoma Supreme Court opinion in the *Cities Service* case, 220 Pac. 279, 287."

Phillips again fails to state a material fact in the record. It is true that the gas leases referred to by it did contain such provisions when executed, but these leases were thereafter definitely and materially, in many instances, amended by the gas royalty agreements entered into by Phillips with many lessor royalty owners (R. 50 and 30).

These royalty agreements in specific terms superseded and modified the lease provisions. In lieu of the lease clauses providing for one-eighth of the market value or proceeds of sale, they substituted a provision calling for a minimum payment to lessors of 4¢ per thousand cubic feet for sweet gas and 3½¢ for sour gas, with a further provision that such minimum should be increased if the weighted average price of the gas sold by Phillips in one Oklahoma and two Texas counties should exceed such minimum price (R. 50).

Order No. 28884 would make it possible for these royalty agreements to defeat one of the purposes of the price orders and one of the grounds upon which they were justified and approved by the courts. This would result in gross and unfair discrimination since the effect of the

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price order would then vary with the terms of different leases and other contracts. By ingenious contracts, lessee-producers could take large quantities of gas from some at much less than the minimum price fixed by the orders while paying such minimum price to others. Such discrimination would tend to destroy correlative rights and the conservation of gas, the basic principles of the orders.

(d) The Commission's price orders are legislative orders, having the force of law analogous to an act of the Legislature. *Arizona Grocery Co.* v. *The Atchison, Topeka and Santa Fe Railway Co., supra.*

In the case of *Cities Service Gas Co.* v. *Peerless Oil and Gas Co., supra,* the Supreme Court of Oklahoma said:

> "The orders are legislative in character and subject in a large measure to the rules and principles by which the validity of statutes are determined."

It is a judicial function within the jurisdiction of the Oklahoma Supreme Court to construe the statutes of the state and the legislative orders of the Corporation Commission, such as the price orders herein involved, for the purpose of determining their meaning and application. When so interpreted and construed by the highest court of the state, such construction and interpretation is binding upon all, and the Commission is powerless to give its price orders a different interpretation or application from that of the highest judicial authority in the state. Phillips cites at page 16 of its petition the case of *Columbian Fuel Corp.* v. *Panhandle Eastern Pipe Line Co.*, 271 P.2d 773, by the Supreme Court of Kansas, in support of its contention that

the order of July 16, 1954, is conclusive upon federal courts as to the meaning and application of its previous price fixing orders, and seems to rely heavily on the statement therein that an administrative body's interpretation of its own rules, orders or regulations, in case of ambiguity, is entitled to great weight. In view of what has already been said, this case could have no application for the reason that there is no ambiguity in the orders and the Supreme Court of Oklahoma, in the case of *Cities Service Gas Co.* v. *Peerless Oil and Gas Co., supra*, so found, although Cities Service and Phillips contended to the contrary. Moreover, in the case relied upon by Phillips, and in other cases cited, there had not been, as in the present case, prior judicial interpretation and construction of the language of the administrative orders.

In *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, cited by Phillips, there had apparently been no judicial interpretation of an administrative regulation. The federal courts in construing a state statute accept the controlling decisions of the highest court of the state and only give weight to administrative interpretations when there have been no judicial interpretations by such court.

II.

Phillips' asserted second reason for granting the writ is based upon its claim that the minimum price orders as applied and construed by the Court of Appeals constitute a taking of private property and an impairment of private contracts in violation of the Due Process and Contract Impairment Clauses of the Federal Constitution. Petitioner

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states that the Cabot-Phillips contract provides for what Phillips labels "an overriding royalty payment." There is no such term used in this contract. Labels are not important. Both the trial court and the Court of Appeals found that under the plain language of the contract Cabot was the owner of one-fourth of seven-eighths of the gas and that Phillips purchased the same as produced. Therefore, it was a simple purchase and sale. The price fixing orders as construed by the Commission [Orders No. 19702 (R. 84-87) and No. 24745 (R. 91)] and the Supreme Court of Oklahoma applied to all sales and purchases of gas in the Guymon-Hugoton field. *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 203 Okla. 35, 220 P.2d 279; *Natural Gas Pipe Line Company of America* v. *Panoma Corporation et al.*, 271 P.2d 354; *Natural Gas Pipe Line Company of America* v. *Corporation Commission of Oklahoma*, 272 P.2d 425.

Petitioner makes the claim that the one-fourth of seven-eighths of the gas reserved by Cabot was a part of the consideration that Phillips paid for the leases. This is an incorrect statement. Phillips overlooks the fact that Cabot was the lessee when the contract was executed and that as such was the owner of the underlying gas—such gas was its property and it could deal with it like any other property. By the terms of the contract it transferred a three-fourths interest therein to Phillips and Phillips never at any time became the owner of the other quarter interest that was retained by Cabot until after the gas was produced. Obviously, Phillips could not give Cabot, as a consideration, something Phillips never had. Even if it

were a consideration, it would be immaterial. *City of Durant et al.* v. *Consumers' Light & Power Co.*, 71 Okla. 282, 177 Pac. 361.

Phillips has several times mentioned in its petition that the Commission in Order No. 19702 found that the applicant was at that time in compliance with Order No. 19514 fixing the minimum price for gas in the field at 7¢ per thousand cubic feet, but has failed to call to the attention of this Court the subsequent order of the Commission made in the *Panoma* case (R. 91-95) wherein the Commission explained the circumstances under which the statement was made and completely rejected the inference of compliance to be drawn from its order denying Phillips' application to vacate.

Moreover, Phillips did not accept the Commission's statement of compliance in its Order No. 19702, but in fact persistently urged in both the Supreme Court of Oklahoma and in this Court that the statement was unsound.

The record (R. 78, 80) also discloses that at the time Order No. 19702 was entered Phillips was under contract with Panhandle Eastern Pipe Line Company to sell it gas from the Guymon-Hugoton field at 4¢ per thousand cubic feet and the Commission, apparently without any investigation of the situation, assumed that the gross proceeds of the by-products extracted from said gas by Phillips should be added to the 4¢ contract price paid by Panhandle Eastern in determining whether the 7¢ was realized and the order thereby complied with.

That question constituted the material issue in the Panoma case. The pipeline company purchaser from Panoma urged that the Commission was bound by its statement (unsupported by the record) in Order No. 19702 denying Phillips' motion to vacate or modify the 7¢ price order and that the Commission should include the proceeds of the by-products extracted from the gas in determining whether the price realized was as much as the minimum price fixed by the 7¢ order. The Commission held that the proceeds of the by-products were not to be considered, as the cost of such extraction was substantially equal to the amount realized from the by-products. Later in the pipeline cases the Commission in Order No. 26096 adopted a formula to this effect and on appeal the formula was held to be reasonable and valid by the Oklahoma Supreme Court. *Natural Gas Pipe Line Company of America* v. *Corporation Commission of Oklahoma, supra.*

In the proceedings before the Commission resulting in the 9.8262¢ order Phillips again strenuously urged that the proceeds from the by-products should not be considered, while the pipeline companies, as above stated, insisted the proceeds should be included. Since the pipeline companies urged that what was said by the Commission in Order No. 19702 with reference to Phillips' compliance was binding in their cases and should be adhered to, the Commission rejected the contention (Paragraphs 10 and 11, Order No. 24745, R. 94-95) as did the Oklahoma Supreme Court in the *Panoma* case.

In view of this uncontradicted record, it does seem that petitioner has taken an untenable position.

Throughout its petition Phillips has repeatedly drawn inferences and conclusions and set forth imaginary fact situations wholly unsubstantiated by the record. It gives very slight, if any, consideration to the adjudications of the courts by which the issues in this case have been considered. Among these matters is the persistency with which Phillips implies it was not a purchaser of gas at the time the 7¢ order was made. During all that time it was purchasing gas from Cabot and others, and at the time and before the making of the 9.8262¢ order it was purchasing large quantities of gas in the Guymon-Hugoton field.

In the case of *Natural Gas Pipe Line Company et al. v. Corporation Commission et al., supra,* the Supreme Court of Oklahoma, in referring to the evidence offered by Phillips before the Commission, stated that:

> "Phillips has contracts with certain other producers by which it purchases gas at their wellheads, which gas it gathers, processes and sells in the same manner as the gas from its own wells and leases; that the production from its own leases is 14% of the total production of the field and the gas it purchases is 4.4% of the field total, making a total of gas which it produces or purchases of 18.4% of the field total; * * *."

Phillips asserts (page 22 of its petition) that the effect of the judgment of the Court of Appeals is to require Phillips to pay a huge sum of money to Cabot for Cabot's own private enrichment, in disregard of the contract. This contention was disposed of by this Court in the *Cities Service* case, *supra,* by the statement that a group of private

producers and royalty owners deriving substantial gain from the regulations does not contradict the established connection between the orders and a statewide interest in conservation. Petitioner also ignores the fact that its own enrichment under the Commission's orders far exceeds Cabot's.

Phillips, among others, urged in the Supreme Court of Oklahoma that the 9.8262¢ price order is valid and that it compels the Panhandle Eastern to pay Phillips the price fixed therein. This claim was sustained by the Supreme Court of Oklahoma in *Natural Gas Pipe Line Company of America* v. *Corporation Commission, supra.* On the sale by Phillips of its share of the gas produced from the leaseholds involved herein alone, Phillips will receive $3.00 for every additional dollar it pays Cabot.

This Court disposed of substantially the same claim with respect to the Due Process Clause of the Federal Constitution adversely to petitioner's contention in the cases of *Cities Service Gas Co.* v. *Peerless Oil and Gas Co., supra,* and *Phillips Petroleum Company* v. *State et al., supra.*

The orders as applied to the contract herein involved also do not violate the Contract Impairment Clauses for it is well settled by the decisions of this Court that private contracts are subject to change by the exercise of the police power of the state:

—*Patterson* v. *Stanolind Oil & Gas Company,* 305 U.S. 376;

Union Dry Goods Company v. *Georgia Public Service Corporation,* 248 U.S. 372, 376;

Hudson County Water Co. v. *McCarter*, 209 U.S. 349, 357;

Atlantic Coast Line R. R. Co. v. *Goldsboro*, 232 U.S. 548, 558;

Louisville & Nashville Railroad Co. v. *Mottley*, 219 U.S. 467, 482;

Stephenson v. *Binford*, 287 U.S. 251, 276;

Armour Packing Company v. *United States*, 209 U.S. 56, 82;

Midland Realty Company v. *Kansas City Power and Light Company*, 300 U.S. 109;

United States v. *B. & O. R. Co.*, 333 U.S. 169, 175;

Philadelphia B. & W. R. Co. v. *Schubert*, 224 U.S. 603, 613-614;

Henderson Co. v. *Thompson*, 300 U.S. 258;

Sproles v. *Binford*, 286 U.S. 374, 390;

Producers Transportation Co. v. *Railroad Commission*, 251 U.S. 228;

State of Oklahoma ex rel. v. *Oklahoma Natural Gas Corp.* (10 C.C.A.), 89 F.2d 416;

City of Tulsa v. *Oklahoma Natural Gas Co.*, 4 F.2d 399, appeal dismissed 269 U.S. 527.

The same principle has been applied by the Supreme Court of Oklahoma in numerous cases:

—*Cities Service Gas Company* v. *Peerless Oil & Gas Company, supra;*

Natural Gas Pipe Line Company of America v. *Panoma Corporation, supra;*

Natural Gas Pipe Line Company of America v. *Corporation Commission of Oklahoma, supra;*

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State ex rel. Roth v. *Waterfield*, 167 Okla. 209, 29 P.2d 24;

Southern Oil Corporation v. *Yale Natural Gas Co.*, 89 Okla. 121, 214 Pac. 131, affirmed in 266 U.S. 583;

Consumers Gas Co. v. *Corporation Commission*, 95 Okla. 57, 219 Pac. 126;

Eagle-Picher Lead Co. v. *Henryetta Gas Co.*, 112 Okla. 65, 239 Pac. 890;

American Indian Oil & Gas Co. v. *George F. Collins & Co.*, 157 Okla. 49, 9 P.2d 438;

City of Durant et al. v. *Consumers' Light & Power Co.*, 71 Okla. 282, 177 Pac. 361.

Petitioner's contention that the Commission's orders cannot be sustained on the grounds of waste prevention or correlative rights protection is wholly without merit. It unsuccessfully made this same contention as to the 7¢ price order in the Supreme Court of Oklahoma in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, *supra*, and in this Court in *Phillips Petroleum Company* v. *State*, *supra*.

III.

Phillips' third asserted reason for granting the writ is that the constitutional questions here presented by it could have and should have been avoided by the Court of Appeals. According to petitioner's own argument, the only way the Court of Appeals could have applied the orders in a way to avoid the constitutional questions here asserted by petitioner would have been for it to have decided the case in petitioner's favor. The Court of Appeals construed

the orders in accordance with the construction of the Supreme Court of Oklahoma and the decisions of this Court as applying to all sales and purchases of gas and applied this ruling principle to the facts of this case. The governing legal principles having been theretofore authoritatively decided, there was no occasion for the Court of Appeals to delay its decision.

Petitioner further contends that the Court of Appeals should have stayed further proceedings in this case pending an interpretation of the minimum price orders by the State Supreme Court or by the Commission. There was no occasion whatever for the Court of Appeals to stay further proceedings since the Supreme Court of Oklahoma had already judicially interpreted and construed the orders. Moreover, during the entire course of the present litigation between Cabot and Phillips there was no suggestion made by petitioner that the proceedings be stayed until the filing of its petition for rehearing after the Court of Appeals had rendered its decision, notwithstanding Phillips was thoroughly familiar with all of the pending cases cited in its petition for rehearing. In fact it was a party to all of these pending cases except the case of *Panoma Corporation* v. *The Texas Company*. As heretofore stated, these cases have since been decided by the Supreme Court of Oklahoma, in which it adhered to its former decisions in construing and applying the price fixing orders.

IV.

Phillips' fourth asserted reason for granting the writ is that the Court of Appeals misinterpreted and misapplied

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the minimum price orders and violated settled state law in respect to ownership of gas in place. It asserts under subdivision (a) that the Court of Appeals' interpretation is in conflict with the language of the orders, with their basic purpose, and with the findings of the Commission.

Petitioner admits that this claim is one with which this Court would not ordinarily concern itself, citing *Huddleston* v. *Dwyer*, 322 U.S. 232, 237, but contends that the Court of Appeals' interpretation and application of the order has presented a serious constitutional question and for that reason it should have declined to interpret the orders until the state tribunals had interpreted them.

The above contentions are wholly without substance or merit for the reasons:

(1) At the time of the rendition of the judgment the Court of Appeals correctly applied the law of ownership of gas as declared by the Supreme Court of Oklahoma. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co., supra,* and *Natural Gas Pipe Line Company of America* v. *Panoma Corporation, supra.* Since that time the State Supreme Court has not changed its former rulings, but has reaffirmed and applied them. *Natural Gas Pipe Line Company of America* v. *Corporation Commission, supra.*

(2) The judgment of the Court of Appeals does not present a serious constitutional question for the reasons hereinabove stated.

(3) As we shall hereafter show, petitioner's argument under subdivision (c) is also without substance as the Court of Appeals correctly decided the question of the

ownership of gas in place by application of the law of Oklahoma as declared by statute and the decisions of its Supreme Court.

In further support of its contentions, petitioner proceeds on pages 36 to 40, inclusive, to discuss alleged findings and purposes of the Commission's orders. We consider all such argument irrelevant at this late day in view of the fact that these questions have all been settled adversely to petitioner's contention by this Court and by the Supreme Court of Oklahoma in the cases above cited.

In the light of the decisions of this Court, it seems unnecessary to refer further to the detailed findings in the Commission's orders or to extensively quote from the decisions of the Supreme Court of Oklahoma. We deem it appropriate, however, to call this Court's attention to its own decision in the *Phillips'* case.

For the same reasons above given, there is no merit in petitioner's contention that the price orders as construed and applied by the Court of Appeals exceed the statutory powers of the Commission. The statutory power to make such orders under the conservation laws has been established by the Supreme Court of Oklahoma in the cases heretofore cited as being a proper exercise of the police power of the state and that all contracts are subject thereto. *Natural Gas Pipe Line Co.* v. *Panoma Corporation, supra.* Therefore, the Court of Appeals was eminently right in following the decisions of the State Supreme Court and applying the principles therein announced to the contract involved herein. This Court in the *Cities Service* case said:

"Like any other regulation, a price-fixing order is lawful if substantially related to a legitimate end sought to be attained. *Nebbia* v. *New York*, 291 U.S. 502 (1934) and cases therein cited. In the proceedings before the Commission in this case, there was ample evidence to sustain its finding that existing low field prices were resulting in economic waste and conductive to physical waste. That is a sufficient basis for the orders issued."

THE COURT OF APPEALS APPLIED THE LAW OF OKLAHOMA AS TO THE OWNERSHIP OF GAS IN PLACE

Petitioner, under sub-section (c) of its fourth alleged reason for granting the writ, contends in effect that the Court of Appeals did not apply the law of Oklahoma in respect to the ownership of gas in place. There is no basis whatever for this contention.

Whatever may have been the rule of the State of Oklahoma decisions prior thereto, Paragraph 231, Title 52, O.S.A., enacted in 1913, provided that:

"All natural gas under the surface of any land in this state is hereby declared to be and is the property of the owners, or gas lessees of the surface under which gas is located in its original state."

In Chapter 26, page 404 of "Conservation of Oil and Gas, a Legal History," published in 1948 by the Section on Mineral Law of the American Bar Association, it is stated, in referring to Setcions 231 and 233 of Title 52, O.S. 1951, that:

> "Another 1913 act adopted the theory of ownership of gas in place and provided that a well in the common source of supply reduced the gas to possession."

In the *Cities Service and Phillips'* cases, *supra*, the Supreme Court of Oklahoma recognized this statute and gave full force and effect to its language providing for ownership of gas in place. This Court also recognized the validity, attached importance to and apparently considered conclusive the provisions of the statute. This appears from the following excerpt from its opinion (340 U.S. 179):

> "The Supreme Court of Oklahoma rejected these claims. It found that the Oklahoma statutes fully empowered the Commission to take the action which it took. The Oklahoma legislature, as early as 1913 declared that gas underlying land is the property of the landowner or his lessee; that gas may be taken from a common source of supply proportionately to the natural flow of the well and that the drilling of a well by an owner or lessee shall be regarded as reducing to possession his share of the gas, * * *."

Thus, as each well is drilled to production the gas owners reduce the gas to possession. If any fictitious legal incapability of ownership of gas which has not been reduced to possession be claimed, there certainly can be no such claim as to owning gas which has been reduced to possession. By drilling into the gas reservoir Phillips reduced to possession for Cabot one-fourth of seven-eighths of the gas along with its own share of said gas. Therefore, Cabot's ownership of the gas became complete at that time if not prior thereto.

Apart from the provisions of the Gas Act of 1913, Sections 231 and 232, Title 52, O.S. 1951, the Commission, as a part of and in furtherance of its broad regulatory powers (Laws 1915, Ch. 197, Sec. 4; Title 52, Sec. 239, O.S. 1951; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 203 Okla. 35, 220 P.2d 279) has power and authority to consider gas as subject to ownership in place, which is what it did in its price fixing orders, and the Supreme Court of Oklahoma on the appeal from the Panoma order (No. 24745) recognized the validity of a sale of gas in the ground.

> "These contract provisions tend strongly to support commission's findings, and to indicate that in truth and in fact Natural bought and contracted to buy all of Panoma's Natural *gas in the ground* and to be produced from under this 78,000 acres, and that all provisions for drilling, producing, piping, compressing, processing, metering, etc. were merely details of delivery to Natural of that which it had already bought." *Natural Gas Pipe Line Company of America* v. *Panoma Corporation et al., supra.*

The Supreme Court of Oklahoma has, in many cases dealing with regulatory orders of the Commission, approved the abrogation or modification of many of the established rules based by analogy on common-law principles.

In *Gruger* v. *Phillips Petroleum Company,* 192 Okla. 259, 135 P.2d 485, it has expressly held that the Commission could, as an incident of regulation, modify or abrogate the law of capture. See also *Patterson* v. *Stanolind Oil and Gas Co. et al.,* 182 Okla. 155, 77 P.2d 83, affirmed 305 U.S.

376; *Palmer Oil Corporation, et al.* v. *Phillips Petroleum Company et al.*, 204 Okla. 543, 231 P.2d 997.

CONCLUSION

We respectfully submit that the writ should be denied.

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